IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,
Petitioner,

vs.

RUSSELL & CO., S. en C.,
Respondent.

CLOSING PORTION OF ORAL ARGUMENT FOR PETITIONER
(Second day, Tuesday, February 4, 1942)

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

GEORGE A. MALCOLM,
Attorney General of Puerto Rico.

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Of Counsel.

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Washington, D. C.,
Wednesday, February 4, 1942.

Oral argument in the above entitled matter was resumed before the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States, at 12:05 o'clock p.m.

APPEARANCES:

On behalf of the Petitioner,
THE PEOPLE OF PUERTO RICO,
WILLIAM CATTRON RIGBY, ESQ.

On behalf of the Respondent,
RUSSELL & Co., S. en C.:
GEORGE M. WOLFSON, ESQ.

PROCEEDINGS

THE CHIEF JUSTICE: Proceed with the cause on argument.

THE CLERK: Counsel are present.

ARGUMENT OF COLONEL WILLIAM CATTRON RIGBY, ON BEHALF OF THE PETITIONER, THE PEOPLE OF PUERTO RICO (resumed):

(The previous day's oral argument not being reported.)

MR. RIGBY: May it please the Court, I find that I need to make one little correction in what I said. The Court asked me whether this former case of People of Puerto Rico against Russell & Company—the Fortuna Estates case, rather; the Forfuna Estates case in 268 Federal, had gone to this Court. I said I thought it had, and had gone off on the question of jurisdiction. I find I was mistaken. That case for some reason never came up here.

The case that I had in mind was another case brought up at the same 1921 term of this Court, also a Fortuna Estates case, in which the question was presented, and the only question presented there was whether the sociedad en comandita was to be considered a corporation for the purpose of Federal jurisdiction. Certiorari was denied at that time. Afterwards the same question came up in this case on the formal hearing and this Court, reversing the prior decisions, held that it is a corporation for the purpose of Federal jurisdiction. So for the first time in this litigation the Insular Supreme Court got a chance to express its opinion of the meaning of the contract when the case went back there.

Now, as to the reasonableness of the opinion of the Insular Supreme Court, construing these 1914 contracts and holding that the use of the word "delivery" does not necessarily imply that the People of Puerto Rico were contracting to bear the expense of getting the water to the places where it was to be made available—

THE CHIEF JUSTICE: Now, will you explain why, if delivery was to be the compensation, the compensation for the water which they were entitled to?

MR. RIGBY: I want to try to, in a few words.

In the first place, the water that was given to them before was a matter that lay in grants, and this contract necessarily also was in the nature of a grant. Because under the Law of Waters, the old Spanish Law of Waters in force prior to that time, when those old concessions were given, in force when the contracts were made and still in force,

it provides that "authority"—this is Article 147 of the Law of Waters, if I may add it to my citations—

THE CHIEF JUSTICE: Not printed?

MR. RIGBY: Not printed. If I may be permitted to, I will add it in.

THE CHIEF JUSTICE: If you will file copies; nine copies.

MR. RIGBY: I will be glad to. This is Section 2533 of the Revised Statutes of Puerto Rico. It provides:

> "Authority is necessary for the use of public waters especially destined to enterprises of public or private interest, excepting in the cases mentioned in Articles six, one hundred seventy-four, one hundred seventy-seven and one hundred eighty-four of this law."

Which exceptions, I may say, have nothing to do with this case.

Then Article 184 of the same Law of Waters, which is Section 2570 of the Revised Statutes, provides:

> "In navigable rivers the riparian owners may without restriction place on their respective margins pumps or any other device for obtaining the water necessary for the irrigation of their estates abutting thereon, provided they do not interfere with navigation. In other public rivers"—

That is, those that are not navigable. And without question this Jacaguas River is not a navigable river.

THE CHIEF JUSTICE: Is it a public river?

MR. RIGBY: It is a public river.

> "In other public rivers the authority of the Governor of the Province shall be necessary."

So that this refers to that claim for the right to take it, to put in the pumps and to take the water.

THE CHIEF JUSTICE: Now, that had been given, the permission had been?

MR. RIGBY: The permission had been given, and they claimed it.

THE CHIEF JUSTICE: And in order to avail themselves of the water all that was necessary for them was to take it when it was flowing down the stream?

MR. RIGBY: Yes. To put in the pumps and to pay the expense, whatever it might be, of taking it from time to time.

THE CHIEF JUSTICE: Now, this expense that was involved was the expense of putting in pumps or taking the water that arrived at the land of the claimant?

MR. RIGBY: It is an expense for carrying it to that point, whatever the ditches might cost to get it there.

THE CHIEF JUSTICE: And that expense, as I understand it, was incurred in order to insure a regular flow?

MR. RIGBY: Precisely. Not only the regular flow—

THE CHIEF JUSTICE: And the amount which was to be determined here was the amount of the regular flow which would compensate for the larger volume of irregular flow; is that right?

MR. RIGBY: The claimant got water from different places of distribution. You see, under the old concessions along the Jacaguas River there were a great many little land owners in the early days, and each one of those had gotten a concession to take not exceeding so much water, which he could use on that particular land, and only of course on that particular land. And in the course of years the total of those concessions naturally had amounted to considerably more than the flow of the river. So that it became necessary to provide for priorities as to the taking; and that was done.

That situation led to the necessity of putting in some kind of public irrigation system because, as I said, the total rainfall over on the south side is only about half the amount necessary annually for the cultivation of cane. It takes about 96 inches of rain on the average annually, as I understand it, and while on the north side there is something like 100 inches of rainfall per annum, on the south side it was only about half of it. So that the Spanish concession owners were not getting the rain which they needed.

To solve that situation, provision was made, under the

Act of 1908 for the building of a public irrigation system, the impounding of the waters of the Jacaguas River for the Guayabal Dam, and in addition to that bringing through by a tunnel from the Toro Negro River on the north side of the ridge water to enable the production and impounding of enough water ordinarily to carry on the irrigation necessary for the south side.

Now, some of the owners on the south side had no concessions, Spanish concessions, at all that they claimed. Others did. The irrigation system that was formed included lands some of which had these concession rights, and some did not. Most of the owners of the concession rights under the Act of 1908, as amended in 1911 and then under the Act of 1913, they had given up their rights; had surrendered them to the government entirely and taken in place of that their rights under the the irrigation district.

But there were other holders of concession rights, including the predecessors of this respondent, who refused to do that; who preferred to stand upon their old rights, and refused to surrender them.

So along in 1913, when the irrigation works were nearly completed—I find from the old records they were actually completed, or substantially so, in March, 1914—in 1913, when they were about to be completed, the situation was presented to the Legislature as to what would be the fair way to solve the situation presented in that way by these holders not being willing to surrender their rights. So at that time this Act of 1913 provided, among other things, in this Section 13 which we read yesterday, that the Commissioner of the Interior was empowered to enter into contracts for the equivalent of the water to be delivered in place of that to which they were entitled under their old concessions. What would be the equivalent in value for the delivery to the lands to which the said water rights or concessions are appurtenant of such equivalent, And the provision is, of course, which shall be delivered to the lands to which the water rights or concessions are appurtenant as the fair

equivalent thereof, with the power to enter into agreements for the relinquishment. Well, these people did not relinquish.

Now, when they came to provide as to the conditions of the delivery—and the language exactly is given—"negotiate with the owner or owners of such water rights or concessions"—

THE CHIEF JUSTICE: Where are you reading from, now?

MR. RIGBY: I am reading from Section 13 of the Act. I am reading from an old brief, from a copy of it. It appears on page—

THE CHIEF JUSTICE: 41?

MR. RIGBY: 41, yes, of my petition in the present case. "empowered to enter into agreements with such owner or owners as to the amount of water and the time, place and conditions of delivery thereof"—would be the fair equivalent.

Now, the Supreme Court of Puerto Rico construes that to mean the conditions; not necessarily the cost of getting it there is to be borne by the Insular Government, but that the conditions of time and place relate to the fact that the old requirements for only so much water can be delivered under each particular old concession to each particular little tract of land; that can be done away with, so that, as in fact was done here, instead of providing that the Fortuna Estates, which had gathered all these little tracts of land into this ownership, rather than continue to take just so much water here for this ten acres and so much water over here for that fifty acres, and so on, could have it delivered at the four places where they wanted it; getting it higher up on the land, in many instances, and being able to use it over the whole tract, which, of course was a tremendous advantage to them and had a good deal to do, in addition to the regularity of delivery, with the value.

MR. JUSTICE REED: How is the amount which the Fortuna is now asked to pay determined,

MR. RIGBY: It is determined under the provisions of Section 2 of this Act No. 49 of 1921, which is here challenged, and which is on page 28, running onto 29, of the appendix to our petition for certiorari.

MR. JUSTICE REED: Is that in substance the proportion of the cost justly attributable to those tracts of land?

MR. RIGBY: Only of the maintenance. Not at all of the cost of constructing the irrigation system.

MR. JUSTICE REED: Only of the maintenance?

MR. RIGBY: Only of the year-to-year maintenance. And it is to be estimated every year by the Commissioner of the Interior based on the experience of the year before on the actual expense; and if the estimate in any one year is too high then it is to be correspondingly cut down for the following year.

MR. JUSTICE REED: Now, do you mean that while a land owner that did not have any water rights has to pay both the cost of construction and maintenance—

MR. RIGBY: Yes.

MR. JUSTICE REED (continuing):—the Fortuna only has to pay the maintenance?

MR. RIGBY: That is right; exactly.

MR. JUSTICE REED: None of the money, however, goes to the support of the Government? It is not taxes?

MR. RIGBY: It is not taxes in any way.

MR. JUSTICE REED: It is just an assessment against this tract of land for the cost of delivering the water to them?

MR. RIGBY: That is precisely what it is. The Insular Government's treasury has no interest in the matter at all, one way or the other, and never has had.

THE CHIEF JUSTICE: Before the passage of this Act—I have forgotten the dates, but this water right was created before the passage of this Act?

MR. RIGBY: You mean, the one under which these people—

THE CHIEF JUSTICE: The water right that was settled by agreement under the statute.

MR. RIGBY: That was in 1914; under the Act of 1913.

THE CHIEF JUSTICE: Now, what about before this Act?

MR. RIGBY: May I go into the history just a minute, then, of this former litigation, because that brings that in?

THE CHIEF JUSTICE: Perhaps I should tell you what is in my mind: I want to see what practical construction, if any, has been given to that.

MR. RIGBY: Yes. The practical construction was—may I say just a word, first: You see, this Act of 1913 contained no provision for any appropriation of money by the Insular Treasury, no provision authorizing the binding of the Insular Treasury to pay any money at all. Apparently what was in the minds of the parties, if they thought about the cost at all—and presumably they must have—was that it would be possible from the sale of surplus water, not bound to the Fortuna Estates by the contract, to raise the money necessary to pay this increased cost of maintenance.

Now, I say that because that is what appears from the Act immediately following.

THE CHIEF JUSTICE: Now, were there any assessments made before 1921?

MR. RIGBY: Well, yes and no. There were not, apparently, so long as the plan of selling the surplus water was carried out under the contract, giving immediate effect—

THE CHIEF JUSTICE: You mean the sale was enough to pay all the expenses?

MR. RIGBY: Definitely, I do not know. Counsel may know, but I never have understood that there was any deficiency at that time. Apparently that was the thing that was the reason for the——

Immediately, almost, after this contract was made and under another Act, also of 1913—which must have been in the minds of the parties when the contract was made, just the same as this Section 13 of this Act—and that is

Act No. 128, Section 33, of the Legislative Assembly of Puerto Rico of 1913. And may I also add that to my brief?

I quote to you from the old brief of the former Attorney General, Mr. Howard Kern, in the Veitia litigation back in 1917; and this was right after the contracts were made. The Act read this way:

> "That the Commissioner of the Interior under such rules and regulations as may be established by the Executive Council, may sell or lease water controlled by the irrigation service and in excess of the water required by law on the lands in the temporary or permanent irrigation district, for the irrigation of lands either within or without the temporary or permanent irrigation district, or for domestic or other purposes, and the proceeds of such sales or leases shall be applied to the decrease of annual assessments."

Now, under that Act, almost immediately after the 1914 contracts were made, sales were negotiated and contracts made for the sale of surplus water to other parties.

MR. JUSTICE REED: That would seem to be the authority, what you have just read, for assessments against people other than Fortuna.

MR. RIGBY: It would seem to be; I grant that. But apparently they seemed to think they would raise the money in that way. I assume that is what they had in mind, and I am guessing somewhat, because no provision was made in the contracts for the cost of the maintenance.

THE CHIEF JUSTICE: Well, then, assessments were made before 1921?

MR. RIGBY: Well, immediately after these contracts were made, the Fortuna Estates brought an injunction proceeding against the Puerto Rico authorities, claiming that under Section 3 of their contract they were enfitled to all the surplus water.

Now, Section 3 appears on page 29 of the record, and it reads:

"Fortuna Estates is hereby granted the right while this agreement remains in force to take in addition to all amounts of water above specified, from the Jacaguas river by pump at the said Aruz Pumping Station, water which may be available there for irrigation of any of its said lands, to the extent that such taking shall not deprive any owners or users of subsisting water rights or concessions upon the Jacaguas river of the water to which such owners or users may be entitled, either by virtue of such water rights or concessions or by virtue of any agreement or agreements in regard thereto entered into or to be entered into by them with The People of Porto Rico; Provided, however, that should The People of Porto Rico at any time undertake the development and utilization of the surplus waters"—Which has never been done.

MR. JUSTICE REED: Now, where is the provision which led the Government of Puerto Rico to think that they had surplus water to sell?

MR. RIGBY: The right to sell anything except the specific amounts given to the Fortuna Estates by Section "First" of this contract. You see, it said so much water shall be given to them. Then it said, in addition, they shall be entitled to any water available, that may be available there for irrigation. But the position of the Puerto Rico Government was that it was not bound to let any water be available there except the amounts they had specifically given by Section "First" of the contract to these people.

MR. JUSTICE REED: They lost on that, the People of Puerto Rico?

MR. RIGBY: They lost on that, but the thing is modified by the fact that three of the five judges of the Circuit Court of Appeals before whom the matter went in the former case were with them on it, and only two were against them. The first time that it went up the Court was composed of Judges Dodge, Bingham and Aldrich. At that time, although it went back on the question of parties, the court expressed its opinion tentatively in favor of the position

of the People of Porto Rico. But when it went back a second time, the composition of the court had changed, and it was then composed of Judges Bingham, Johnson and Anderson. Judge Bingham, and Judge Johnson concurring, held against the People of Porto Rico; Judge Anderson dissenting very vigorously and calling attention to the fact that the decision was contrary to what had been expressed the first time that it was up. Whether Judge Bingham changed his mind, or whether he went along the first time because it was not a final and definite opinion requiring him to finally express his views or decision, we do not know.

MR. JUSTICE REED: The Chief Justice has asked you about assessments prior to 1921, whether that covered assessments for deficiency in operation expenses. Is that covered in the pleading, and does the record show that?

MR. RIGBY: The record, as far as I know, does not show that, and I am not able to definitely answer it. I could look it up.

But, anyway, after this litigation and when it came back in that way as a result of the decision of a divided court and was not brought up here, the People of Puerto Rico were faced with the question of what do do about this question of the maintenance. It seemed to them that the terms of the contract did not bind them to pay anything, and there is no power under the Act of 1913 for the Commissioner to bind the Insular Government to pay anything. But the thing had to be defrayed, and they felt the only way of doing it was to make a kind of special district of the people who were affected in this way, and to tax them pro-rata for what their fair share of it was.

MR. JUSTICE REED: Had there not been an irrigation district created by the Act of 1913?

MR. RIGBY: Of course; and this is wholly outside of that. This is, in effect, just making a kind of addition, as the Circuit Court of Appeals said in the Porto Rico Railway, Light and Power Company case in 18 (2d) [923-924], where

the same thing was done, of the people who should be taxed in this way.

THE CHIEF JUSTICE: They carved it out of the larger district?

MR. RIGBY: They hardly carved it out of the larger district, because these were people not included in the district; they were people outside.

THE CHIEF JUSTICE: What assessments were made?

MR. RIGBY: The assessments were made actually on all of the districts, as they have been ever since.

THE CHIEF JUSTICE: Then some of the lands affected by this program must have been within some kind of a district before 1921?

MR. RIGBY: The lands affected by the program, but not the lands affected by this litigation. Of course, the land—

THE CHIEF JUSTICE: Well, this litigation only affects Russell's lands?

MR. RIGBY: And also—

THE CHIEF JUSTICE: That is what I am trying to get at, that it—

MR. RIGBY: And also the principles of this litigation.

THE CHIEF JUSTICE: Will you get my question, first, please?

MR. RIGBY: Pardon me.

THE CHIEF JUSTICE: Why was it that Russell's land, which is the only land we are concerned with here, primarily, was never assessed before 1921, How was the expense paid, if there were assessments?

MR. RIGBY: Of course, neither Russell's land, nor the land of other owners in the same situation with Russell, who had refused to give up their concessions and had made contracts like this; none of them was assessed for the cost before this Act of 1921. Before 1921 the assessments were made on the lands within the district, in accordance with the provisions of the original act under which the bonds had been issued.

THE CHIEF JUSTICE: Was not Russell within the larger district?

MR. RIGBY: No.

MR. JUSTICE JACKSON: Your taxing law gave to this district the power to tax these people there because of their territorial inclusion within the district; isn't that true?

MR. RIGBY: The general taxing law of the district did not tax these people because they were not in the district.

MR. JUSTICE JACKSON: Yes. So you went outside of the district and selected people who were getting water from within the district?

MR. RIGBY: Precisely.

MR. JUSTICE JACKSON: And levied taxes on their right to get the water?

MR. RIGBY: In effect, made practically a new district out of them.

MR. JUSTICE JACKSON: Well, irrespective of where their lands might be located?

MR. RIGBY: So long as they were within this class.

MR. JUSTICE JACKSON: A class that bore that primary relationship to this irrigation project.

MR. RIGBY: A class that were getting the water; yes, in view of the fact they were not being charged in any way for the cost of getting it to them.

MR. JUSTICE JACKSON: Now, that gets us back to the contract, Exhibit A of the petition, of June, 1915. Was that originally in Spanish or English?

MR. RIGBY: That is in Spanish; that is the contract.*

MR. JUSTICE JACKSON: That is the contract where you say "delivery" means something other than "delivery" would if used in an American-drawn contract or drawn in the United States?

MR. RIGBY: The word "delivery" does not necessarily mean to convey or to constitute a payment. It is to be determined, as the meaning of any word may be, in view of the circumstances under which it was used, as this Court said in the Shell Company case.

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* A mistake, they were in English. See letter, February 6, 1942. W. C. R.

MR. JUSTICE JACKSON: If we construe it as we would construe a contract which had the word "delivery" in it as drawn in continental United States, there is not any doubt about this tax being imposed?

MR. RIGBY: If the word "delivery" is to be used as it would be in a deed in the United States, to give a technical conveyance meaning, there would be no question about it.

MR. JUSTICE JACKSON: Then the whole thing depends on whether the use of the word "delivery" in the Puerto Rico contract is modified by some substantial implication. I do not find where that is developed at all in the opinion of the Puerto Rico court.

MR. RIGBY: It is not developed. I simply stated my position on that and I quote what this Court said in the Shell Company case.* Words generally have different shades of meaning and are to be construed as being reasonably based on a standard of use to be arrived at by construing not only the words themselves but as well the context, the operation of the law or contract and the circumstances under which the words were employed. The circumstances here—

MR. JUSTICE JACKSON: I know, but if the standard of use has something to do with this, I don't think it is very well pointed out, either in the opinion of the court or in the brief. I would like to know more about that.

MR. RIGBY: I grant that. But the point, as we see it, is that it was made under those circumstances, and the words are not to be given a technical meaning as the word "delivery" would be in a deed here under the circumstances.

MR. JUSTICE JACKSON: "Delivery" is used repeatedly throughout this contract, and is used that this water is to be delivered and delivered in settlement of the claim these people had because of the irrigation project destroying their water rights which they had, and which the contract seems to recognize as authority.

MR. RIGBY: May I just suggest two things there? In the first place, a reading of the contract will show, I think,

* Puerto Rico vs. Shell Co., 302 U. S. 253, 258.

that their rights were not necessarily destroyed. The contract recites that in spite of the building of the dam the People are still in position to deliver under those contracts. But to facilitate everything they could do—

MR. JUSTICE JACKSON: But this was a settlement between their old water rights and the rights under the contract.

MR. RIGBY: But the fact that they refer to the reservoir above the dam and the building of the dam so they may get delivery, and it is also shown by the fact that these contracts provide for ten days every year, that they are to get deliveries in accordance with their old concessions. They kept that right. So it was subsequently necessary—

MR. JUSTICE JACKSON: It was a settlement between the parties of their prior claims of difference; they were all settled by this contract, were they not?

MR. RIGBY: Yes and no. No; they specially reserved the continued validity of their old concessions, and they reserved the right for ten days every year to get the water under those old concessions. Now, that could not be done unless—

MR. JUSTICE JACKSON: That is settled under this; they were rights reserved under this new agreement. We have to start with the agreement.

MR. RIGBY: Yes; and for ten days every year the agreement says that notwithstanding the other provisions they shall get water under their old concessions. Now that shows, of course, it was subsequently possible to do that and continue to do that. It was simply a matter of what would be the most convenient for everybody.

THE CHIEF JUSTICE: May I interrupt you there?

MR. RIGBY: May I add one other thing? The other major thing, as we view it, is that under the Act of 1913 there was no power whatever given to the Commissioner to bind the government for the payment of any money at all; no appropriation from the treasury, and nothing to authorize

him to bind the government to the payment of the money.

THE CHIEF JUSTICE: What money do you refer to?

MR. RIGBY: Pardon me?

THE CHIEF JUSTICE: What money do you refer to?

MR. RIGBY: The cost of the maintenance of this thing. If you say they are bound to deliver that means they must bear the cost, and—

THE CHIEF JUSTICE: Not what the government was bound to do, but what this beneficiary, this grantee of the water right, was bound to do; whether he is bound to pay anything?

MR. RIGBY: Maybe not, and that is why it was left—

THE CHIEF JUSTICE: [illegible]at the government was authorized to make provision for getting the water to those claimants. Now, he is getting the water; he is not complaining about that.

MR. RIGBY: He is getting the water.

THE CHIEF JUSTICE: His only complaint is, as you say, there is some order or condition affecting him that he has to pay for it.

MR. RIGBY: Our position is, as we understand the holding of the Insular Supreme Court there was simply nothing said about the cost of maintenance at all. As to that, it is just as though the contract was not there and had never been made. Under the Spanish concessions the right to take the water lies in grants, and the Government has the right to annex to the grants the cost of getting the water to them.

THE CHIEF JUSTICE: Now, will you state succinctly how you think the word "delivery" should be read in this contract?

MR. RIGBY: As though it were an allotment, substantially. It is simply a determination of the quantum of the water.

THE CHIEF JUSTICE: Allotment where? At the source above the dam, or at the station where he was to receive the water?

MR. RIGBY: It is the allotment they are to get. They have a right to take it, not at the place where it was found, and not so much for each little holding, but in quantities at these four large places, the higher placing above.

MR. JUSTICE BLACK: Mr. Rigby, you started to say one thing I did not quite get. Assuming that Russell & Company are held to be relieved of this payment; who has to pay it?

MR. RIGBY: The other holders. That is the only thing to do. The only thing to do would be to pass a statute assessing the other water takers under the older irrigation statute.

MR. JUSTICE ROBERTS: The people who had no such antecedent rights; the people who benefited by this and had no rights before.

MR. RIGBY: They had to pay the cost of the construction of the irrigation system, and these people were not included.

MR. JUSTICE ROBERTS: Certainly.

THE CHIEF JUSTICE: They had acquired their rights by a reduction of the rights of this claimant Russell?

MR. RIGBY: That is hardly fair to say, because their rights were wholly independent of this.

THE CHIEF JUSTICE: They surrendered some rights in order that these other people, who had no rights, could acquire them; isn't that so?

MR. RIGBY: No; I don't think that is fair to say.

THE CHIEF JUSTICE: What was the compensation given them if they were not surrendering rights?

MR. RIGBY: The regularity of getting so much water and getting it at the places that would be much more convenient, instead of having to take it "catch as catch can" and only use it at particular places.

MR. JUSTICE REED: What did Puerto Rico get in return for what she gave to Fortunas?

MR. RIGBY: The conveience, as it is recited, of being able to handle it in this way, and to say that just so much water and no more, as they thought, will have to go.

THE CHIEF JUSTICE: She could not get that convenience without Russell agreeing to something?

MR. RIGBY: She could not get that convenience—it was not a convenience; but it is carefully recited that—

THE CHIEF JUSTICE: So Russell must have surrendered some right in order to permit it?

MR. RIGBY: It is carefully set out and recited in the contract that it is more convenient to do it that way. It does recite, also—

THE CHIEF JUSTICE: Well, if it was more convenient why did not Puerto Rico go ahead and do it without consulting Russell?

MR. RIGBY: They would have had to condemn.

THE CHIEF JUSTICE: And when you condemn you acquire rights, do you not?

MR. RIGBY: Precisely.

THE CHIEF JUSTICE: And, therefore, instead of condemning, they acquired rights under the contract?

MR. RIGBY: Under the contract. And under a contract that apparently counsel in their own brief say, and it has been said all the way through, that having construed a fair equivalent there was no question but what both sides thought they were doing a good thing for themselves in doing this.

THE CHIEF JUSTICE: And the only question is, what is that equivalent?

MR. RIGBY: The question is whether or not the Supreme Court of Puerto Rico is inescapably wrong in saying that the provision for delivery necessarily binds the People of Puerto Rico to pay the cost of getting it there.

MR. JUSTICE FRANKFURTER: And that turns on what Justice Jackson was inquiring about a little while ago; namely, what "delivery" means, doesn't it?

MR. RIGBY: Under all the circumstances.

MR. JUSTICE FRANKFURTER: Now, as I understood you to say, you have very scanty knowledge of the original contract?

MR. RIGBY: That is true, I confess I have not the Spanish of the contract.

MR. JUSTICE FRANKFURTER: The Supreme Court of Puerto Rico did not even advert to the fact that the issue turned on a special meaning in Spanish of the word "delivery"; isn't that right?

MR. RIGBY: The decision rather is on the fact of the lack of power in the Commissioner under the Act of 1913 to bind the government to paying the expenses.

MR. JUSTICE FRANKFURTER: That is a very different problem and that is a very different ground, isn't it?

MR. RIGBY: That is the ground they practically put it on. Perhaps it is.

MR. JUSTICE FRANKFURTER: That is very different from saying "delivery" does not mean the same as here.

MR. RIGBY: I think that "delivery" as used in view of that limitation necessarily was used subject to that limitation, and that "delivery" cannot mean with that limitation what it might mean were that limitation not there.

MR. JUSTICE JACKSON: Then if any part of your argument depends on the difference between the Spanish language and the English language as to "delivery", I would like to find somebody who did go into that text, if that differential is important to your argument.

MR. RIGBY: Well, to that extent, as I say, that it does not show quite as sharp a contradiction of authorities between the lack of power under the Act of 1913 to bind it, and the giving of a contract using the word "delivery" as though it were used in a deed here. So I shall be very glad to, if I may, file the Spanish text.

(Mr. George M. Wolfson thereupon presented oral argument in behalf of the Respondent, Russell & Co., S. en C.)

MR. RIGBY: May I say one word further?

THE CHIEF JUSTCE: Your time has expired, but if you have something you wish to call to our attention.

MR. RIGBY: If I may say just one word more: As to the question of the supposed delegation of legislative power —we put that in Section II of the reply brief filed yesterday in answer to their brief. Now on that point, the meaning of the decision of the Insular Supreme Court, as I understand it, it rests squarely really on the limitation of power under the Act of 1913 to the Commissioner. You see, the Court in 1920, the Circuit Court of Appeals had said, and I think everybody has agreed, that the power of a government official to contract with the owners of water rights was, under this section of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value. And as Judge Anderson quotes in his dissenting opinion from the brief of counsel for the Fortuna Estates, all that the contract of August 26, 1914, was intended to do or did was to change the method and time of delivery for a small part of the concession waters.

THE CHIEF JUSTICE: We will take that on your brief.

(Whereupon, at 1:30 o'clock p. m., the oral argument was concluded.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 95

THE PEOPLE OF PUERTO RICO,
Petitioner,

vs.

RUSSELL & CO., S. EN C.,
Respondent.

Respondent has been requested to advise the Court what disposition is made of the moneys collectible under Act No. 49 of 1921 (Appendix to Res. Br. 35).

The moneys are paid to the Treasury and credited to the "Irrigation Fund" (App. Res. Br. 37).

This Fund was created by the 1908 Statute, Sec. 3 (App. Res. Br. 39) and was used to pay for the construction and maintenance of the irrigation system.

The tax on lands which were part of the system took account of such construction cost (Sec. 11—1913 Act, App. Res. Br. 43). Act No. 49 purported to take account only of maintenance costs (App. Res. Br. 36).

In later years the Irrigation Fund was used to defray other expenditures, unrelated to the irrigation system as such (Laws of P. R.—1917, Vol. 2, p. 256; 1921, p. 876; 1925, p. 1024; 1927, p. 512; 1929, p. 212) such as the construction of hydro-electric plants making use of water from the system.

Respondent's lands are not and never were included in the Irrigation System (Complaint Par. V, R. 4; Stipulation Par. 20, R. 80; R. 188 at bottom).

February 4, 1942.

Respectfully submitted,

GEORGE M. WOLFSON,
Attorney for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 95

February 6, 1942.

RE: No. 95, THE PEOPLE OF PUERTO RICO

vs.

RUSSELL & CO., S. EN C.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In response to Mr. Justice Jackson's request to me during the oral argument of this case (second day, Wednesday, February 4th) for the Spanish text of the clause of the contracts of August 26, 1914 relating to "delivery", "make delivery to the Fortuna Estates" of the water allotted them,

> "an amount of water which, delivered regularly, may, under all attending circumstances, be considered to be fair equivalent in value for irrigation purposes of the amount of water which the Fortuna Estates would under ordinary circumstances take and use under the said water rights and concessions" (Exhibit A", R. 27, 26),

I sent a radiogram that afternoon to the Attorney General of Puerto Rico, and have received the following reply:

> "Relative radiogram No. 43 of February 4 inquiring whether original contracts of August 26, 1914, with Fortuna Estates were written in Spanish or English. Please be advised all indications show that they were executed in English as shown by public deed No. 26 of June 8, 1915, between Commissioner of Interior and Fortuna Estates."

It thus seems possible that the final drafts of the contracts were put into shape in the New York offices of Fortuna Estates, a New York organization as recited in the contracts (R. 23, 24), and sent down to Puerto Rico for execution.

As to the Spanish text of Section 13 of the Act of August 8, 1913, under which the contracts are recited (R. 26) to have been entered into, I am advised, to my surprise, that the Library of Congress does not have a copy of the Spanish text of the Puerto Rican statutes for that year, 1913 [although they do have them for most years]; and accordingly another radiogram is being sent to the insular Attorney General for that text. It will be presented as soon as it comes in.

It appears thoroughly established, however, and not to be disputed, that Section 13 of that statute [whatever the exact Spanish text may have been], limited the power of the insular contracting officials to dealing only with allotments of the water, and nothing else. As JUDGE BINGHAM said in his opinion in the Circuit Court of Appeals, the second time these contracts were there (*People of Porto Rico* vs. *Russell & Co.*, 268 Fed. 723, 726),—quoted with approval in JUDGE BINGHAM's later opinion, twelve years afterwards, when these contracts were there again, in the earlier phase of the present litigation (*People of Puerto Rico* vs. *Havemeyer*, 60 F. (2d) 10, 13):

> "The power of the government officials to contract with the owners of water rights was, under this section

> of the statute, limited to giving in exchange for the old water rights water which would be a fair equivalent in value."

And as JUDGE ANDERSON noted in his dissenting opinion in the 1920 case (268 Fed. at p. 736) counsel for *Russell & Co.* themselves said, in their brief in that case:

> "'All that the contract of August 26, 1914, was intended to do, or did, was to change the method and time of the delivery of a small part of the concession waters.'"

It seems perfectly plain on the whole situation that the insular officials (at least) expected to be able to cover whatever additional carrying expense should be entailed in making the water allotted under the contracts available at the designated points, from the right, that they at least thought they were getting under the contract to sell,—under the authority given them by Section 33 of this same Act No. 128 of August 8, 1913 [cited on the oral argument here; Laws of Puerto Rico, 1913-1914, pp. 81-82] to:

> "sell or lease water controlled by the irrigation service and in excess of the water required by law on the lands in the temporary or permanent irrigation district . . . ."

That Section 33 was, of course, to be presumed to be just as much in both parties' minds as Section 13. And such sales may have been expected to furnish money enough substantially to cover the added expense of carrying this water to these contractees outside of the Irrigation District.

Accordingly the Commissioner of the Interior proceeded to sell surplus water to other parties. Under one such contract, $6.00 per day was to be received [Parra contract; *Veitia* vs. *Fortuna Estates*, 240 Fed. 256, 269]; but Respondent's predecessor, Fortuna Estates, protested and brought an injunction suit, claiming that, under paragraph "Third" of the contracts (R. 29, 45) *their right to take*,

> —in addition to receiving the fixed amounts of water allotted to them under paragraph "First" of the contracts, and in those paragraphs recited to be (R. 26, 27; 44), "as specified in this paragraph" in itself the "fair equivalent in value for irrigation purposes" of the amounts which the contractees "would under ordinary circumstances take and use" under their old grants and concessions,—

from the Jacaguas River by pump,

> "water which may be available there",

was exclusive, and gave them a positive right to appropriate for themselves *all the water* which might come down into the river at any time in excess of the definite amounts which had been alloted to them by paragraph "First" of the contracts,—and whether such "excess" water came wholly from the watershed of the Jacaguas River or not, and even although a part of it might have come through the contribution to the water behind the dam, derived from the waters brought by the tunnel from the watershed from the Toro River on the north side of the mountain chain.

Of course, if this were correct, there would be no surplus water for the insular officials to sell under Section 33 of the Act of 1913; and hence no money receivable to cover the cost of carrying to the contractees the water allotted to them under paragraph "First" of the contracts.

JUDGE HAMILTON, in the Federal District Court for Puerto Rico, sustained the claim, and granted the injunction. On appeal to the Circuit Court of Appeals he was reversed by that court, then composed of JUDGES DODGE, BINGHAM and ALDRICH. The case went off, however, on a question of jurisdiction, without a definite decision on the merits; but nevertheless JUDGE DODGE, writing the unanimous opinion of the court, strongly intimated that they thought the plaintiff's claim was not sustainable. The opinion said (240 Fed., *supra*, at p. 263):

> "It cannot be said that the plaintiff's contract of August 26, 1914, plainly vested in the plaintiff such rights to excess water as it now claims. The terms of the third paragraph, whereon the plaintiff relies, do not, in express terms, grant any right to excess or surplus water. Neither expression is used, and the burden was on the plaintiff to establish the construction for which it contends as the true construction, in view of all the other provisions of the contract and the circumstances therein referred to."

The case went back; DISTRICT JUDGE HAMILTON still adhered to his opinion. On the second appeal the composition of the Circuit Court of Appeals had changed. It had become JUDGES BINGHAM, JOHNSON and ANDERSON. JUDGE BINGHAM apparently changed his mind; and in the opinion written by him and concurred in by JUDGE JOHNSON (but with JUDGE ANDERSON strongly dissenting) plaintiff's claim was sustained, and it was given all the water. JUDGE ANDERSON says (dissenting opinion, 268 Fed. at p. 732, that the prevailing majority opinion

> "is inconsistent with the opinion of the court, consisting of JUDGES DODGE, BINGHAM and ALDRICH, when the case was here before";

and that (at pp. 735-736):

> "(4) Moreover, the statutory power to contract was limited to 'equivalence in value.' The result reached plainly gives the plaintiffs, not equivalence, but large profits, out of this public irrigation system."

In tabular form the net result of that injunction decree appears to be, substantially:

RESPONDENT'S WATER RIGHTS

BEFORE THE CONTRACTS: UNDER THEIR OLD GRANTS AND CONCESSIONS.

12,612.10 acre feet per year, maximum [11,032.79, plus

1,579.31; for different properties; R. 13, 16]. No minimum. No assurance of receiving any minimum amount whatever. Right to take, for each of many small parcels, limited for each to amount fixed by grant for that particular parcel (tables, R. 39). No right to any water not arising from the watershed of the Jacaguas River itself. Simply a right to "catch as catch can" from such water as might be available in the river, but not exceeding the amounts of the respective separate grants. Subject to all variations of seasons and rainfall. Nothing else.

AFTER AUGUST 26, 1914: UNDER THE CONTRACTS: [As construed by the majority opinion of the Circuit Court of Appeals in the 1920 decision, 268 Fed. 723, *supra*]:

First. An absolute right to 9,205.45 acre feet [6,258.90 for Fortuna Estates, and 946.55 for Union and Placeres Estates]. To be received regularly, at regular times, every year, regardless of variations in seasons and rainfall. *A guaranteed minimum.* And

Second. Receivable not only from water from the watershed of the Jacaguas River, but *also out of that coming through the tunnel from the Toro River on the north side,* thus guaranteeing, in effect, that there would never be a shortage, and that this fixed minimum would always be received; and then, along with that, and in addition,

Third. Whatever further water there might be left in the river [under paragraph "Third" of the contracts, as construed in the 1920 divided court decision of the Circuit Court of Appeals]; and finally,—[besides the "torrential waters", their right to which, as theretofore, remained unchanged],— also

Fourth. The right, ten days in every year, to have the water let down to them, to take from the Jacaguas River, in accordance with their old grants and concessions [Par. "Fifth", R. 30-31; 47-48]. (Thus requiring the insular government always to keep the irrigation system in such shape

that it would be possible for these concessionaires to exercise their rights, under their old concessions.)

Under these contracts, as thus construed by that injunction decree of 1920, *what possible consideration* did the insular government, or the land owners within the irrigation district, receive in exchange for what they were giving up? As JUDGE ANDERSON said in his dissenting opinion above quoted (268 Fed. *supra*, at pp. 735, 736), it clearly gave the contractees,

> "not equivalence, but large profits, out of this public irrigation system."

It left no means of paying for the cost of carrying to them the water allotted to the contractees. Unless, as JUDGE ANDERSON suggests might become necessary, the land-owners in the irrigation district were to be taxed to pay for it (268 Fed. *supra*, at p. 736), for the benefit of these contractees. The only other way was to levy an equitable tax, in the nature of a special tax or assessment upon these lands thus receiving these special benefits of these contracts, to defray the actual cost of maintenance and expenses in delivering the water to them.

But now Respondent sets up that the contracts, in addition to giving all of the benefits above listed, were also intended to imply a money obligation,—or else to levy a tax on the water users within the irrigation district,—to find the money to carry this water to these contractees. And that, therefore, this Act of 1921 taxing these specially benefited lands "impairs the obligation of the contracts."

The insular Supreme Court declined to construe the contracts in any such way. As it says (R. 156; *Petition for Certiorari*, p. 3, footnote 2):

> "Indeed even if a clause like that had been included, we apprehend that it would have been void";

because of lack of authority on the part of the contracting officials to make it under the empowering Act of 1913.

We venture to present with this a printed transcript of the second day's portion of our oral argument; that of Wednesday, February 4th, which includes the copies of the additional statutes cited during the argument, requested to be filed.

Respectfully submitted,

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GEORGE A. MALCOLM,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
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Of Counsel.

P. S. Copy being mailed to counsel for Respondent.